

Proceeding: IN THE MATTER OF DEPLOYMENT OF WIRELINE SERVICES OFFERING A ☒ Record 1 of 1

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced telecommunications Capability)	

COMMENTS OF WILLIAMS COMMUNICATIONS, INC.

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I. Introduction

Williams Communications, Inc. ("Williams"), through its wholly owned business unit, Williams Network Services, is constructing a national fiber optic backbone network utilizing ATM routing over an advanced SONET transmission backbone. Williams' network currently encompasses 16,500 miles of fiber in service, which should expand to 18,000 miles by the end of the year. Additional fiber builds are in progress, and by 2001, Williams Network Services will comprise a 32,000 mile fiber optic network. Because of its ATM over SONET architecture, Williams' entire backbone network constitutes a "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."¹

Williams is a wholesale provider of this "advanced telecommunications capability" to other telecommunications carriers, whose demand for such network capabilities is necessarily a function of such other carriers' retail demand. Retail demand, in turn, is contingent on the availability of adequate retail access to the advanced telecommunications capabilities of the backbone network. The answer to the problem of adequate retail access may be the deployment of xDSL, or other broadband, facilities at the local loop level or "last mile." The carriers best positioned to deploy such facilities are the ILECs, due to their ubiquitous networks already in place. However, the current regulatory regime under the 1996 Act has foisted too many disincentives onto the ILECs to encourage rapid deployment of such facilities. The proposals put forth by the Commission move toward eliminating some of the disincentives, but not far enough.

Williams is extremely interested in the deployment of broadband capabilities in the last mile in order to spur the demand for increased broadband services nationally.² Because Williams is exclusively a wholesale provider of broadband backbone capability rather than a retail competitor in the local exchange markets, and seeks to provide wholesale advanced telecommunications capability to all retail carriers, incumbent and competitor, Williams' perspective set forth in these comments is unique. From this perspective, Williams focuses its comments on what it sees as keys to the deployment of broadband, advanced services in the last mile: separate advanced services affiliates requirements and interLATA relief for those affiliates.

II. Summary

The deployment of advanced services at the local exchange level is fundamental to reaching the full potential of advanced telecommunications capabilities. The risk against faster deployment is that such offerings may not be profitable. To overcome this, Williams supports the Commission's proposal to allow incumbent local exchange carriers ("ILECs") to establish advanced services affiliates that can compete against non-affiliated advanced services entities on a level playing field.

Such an advanced services affiliate should not be bound by the obligations imposed on ILECs under section 251(c), so long as the advanced services affiliate

¹ Telecommunications Act of 1996 ("1996 Act"), § 706, codified at 47 U.S.C. § 157 n. (defining "advanced telecommunications capability").

² The issues on which the Commission seeks comment in this proceeding seem to be limited to the context of encouraging the deployment of broadband telecommunications channels solely at the local loop level. *See e.g.*, definition of "advanced services" *infra* note 3. In its Notice of Inquiry, CC Docket No. 98-146 (rel. Aug. 7, 1998), the Commission seeks comment in the broader context of deployment of advanced telecommunications capability at all levels: from the local loop to the interstate backbone networks.

acquires on its own the network elements used to provide the advanced services, rather than obtaining ownership of such elements through transfer from its ILEC affiliate. That, however, should be the only prerequisite for such an affiliate to receive non-ILEC status. The additional separation requirements proposed by the Commission are important only in determining whether such an affiliate should also be granted dominant or non-dominant status in addition to non-ILEC status.

The Commission's proposal to allow an ILEC's advanced services affiliate to be free of the obligations of section 251(c), however, will fall short of the Commission's goal to encourage the timely deployment of an ubiquitous advanced service infrastructure in the local exchange area without a concomitant look at how section 271 of the 1996 Act should be applied to a BOC's advanced services affiliate. Such a BOC affiliate would be reluctant to invest heavily in deploying such an infrastructure if it lacks the ability to fully realize the benefits that marketing advanced services with interLATA information services may bring.

Williams, therefore, does not propose to eliminate the section 271 requirements as they apply to a BOC's advance services affiliate's interLATA information services; rather, Williams suggests that the Commission should allow such an affiliate to seek and be granted section 271 authority to provide interLATA information services, including the underlying transmission component of such services, separate from the BOC's provision of basic interLATA telecommunications services. Bifurcating the section 271 process between a BOC's interLATA information services and its interLATA basic telecommunications services should make it easier for a BOC's advanced services affiliate to enter the competitive interLATA information services market with minimal

danger that such an affiliate can exploit its BOC affiliate's bottleneck control of the basic telecommunications facilities in the local exchange.

III. Provision of Advanced Services through a Separate Affiliate

Williams fully supports the Commission's intent in this NPRM to stimulate investment in advanced services³ facilities in the "last mile." Demand, and competition to meet demand have caused an explosion in construction of broadband backbone networks by companies such as Williams, Frontier, IXC, Level 3 and Qwest.⁴ To ensure the continued deployment of such backbone "advanced telecommunications capabilities" in a "reasonable and timely basis,"⁵ however, consumers must have comparable advanced telecommunications capabilities in the last mile.⁶ Indeed, the minimum criterion to spur further consumer demand for any broadband service is access to high-bandwidth capability all the way to the customer premises.⁷

A. Structural Separation Requirements

Williams supports the Commission's proposal to allow ILECs to choose between offering advanced services on an integrated basis, subject to the requirements of section

³ The term "advanced services" is defined in the NPRM as "wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology (commonly referred to as xDSL) and packet-switched technology." *NPRM* ¶ 3 (emphasis added).

⁴ See Joanna Makris, *The Bandwidth Barons*, Data Communications, July 14, 1998, available on the World Wide Web at <<http://www.data.com/roundups/barons.html>>.

⁵ 47 U.S.C. § 157(a) nt.

⁶ As the Commission astutely recognizes, "[n]o matter how fast the [backbone] network is, if the connection between the [backbone] network and the end-user [i.e., the last mile] is slow, then the end-user cannot take advantage of the [backbone] network's high-speed capabilities." *NPRM* ¶ 8.

⁷ See, e.g., Bruce L. Egan, *Information Superhighways: The Economics of Advanced Public Communication Networks* 5 (1991) (identifying "two minimum qualifications for the future network: high-bandwidth capacity all the way to the customer premises and two-way communication capability").

251(c), or offering advanced services through a structurally separate advanced services affiliate free of the requirements of section 251(c).⁸ This approach offers ILECs the ability to more effectively compete in the advanced services local market, while at the same time mitigating the ILECs' ability to unfairly leverage their market dominance in the conventional switched-circuit local market.

1. Applicability of Section 251(c) to an Advanced Services Affiliate

The obligations of section 251(c) apply to all ILECs, as defined in section 251(h)(1).⁹ Williams concurs in the Commission's statutory interpretation that an advanced services affiliate of an ILEC that acquires, on its own, facilities used to provide advanced services is neither an ILEC nor a "successor or assign" of an ILEC, and, therefore, is not subject to the obligations of section 251(c).¹⁰ This is consistent with the Commission's previous interpretation that "section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h)."¹¹

2. Separation Requirements for Non-ILEC Status

To be deemed a non-ILEC, however, requires none of the additional "Separation Requirements for Non-Incumbent LEC Status" proposed by the Commission as a prerequisite to non-ILEC status.¹² In this portion of the NPRM, the Commission sets

⁸ 47 U.S.C. § 251(c).

⁹ *Id.* 251(h)(1). This section defines the term "Incumbent local exchange carrier" as a carrier that provided telephone exchange service on the date of enactment of the 1996 Act, and either (1) was a member of NECA on such date or (2) became a "successor or assign" of such a member on or after such date.

¹⁰ NPRM ¶¶ 92-94.

¹¹ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Report & Order & Further Notice of Proposed Rulemaking, CC Docket No. 96-149, 11 FCC Rcd 21905, ¶ 312 (1996) ("Non-Accounting Safeguards Order").

¹² NPRM ¶¶ 95-97.

forth the “structural separation requirements for advanced services affiliates . . . sufficient to be deemed *non-incumbent LECs*.”¹³ Since “no BOC affiliate was a member of NECA when the 1996 Act was enacted,”¹⁴ the only requirements needed are those necessary to not be deemed a “successor or assign” of an ILEC. The Commission has already pronounced such requirements for BOC affiliates,¹⁵ and there is no reason to apply different requirements to BOC or other ILEC advanced services affiliates.

The Commission’s authority to impose these additional separation requirements on ILECs’ advanced services affiliates comes not from section 251(h),¹⁶ but from its authority under Title II. Under Title II, the Commission has the authority to determine whether to treat such affiliates as dominant or non-dominant to the extent such affiliates use advanced service facilities to provide interstate access service.¹⁷ The Commission’s proposed requirement that an advanced services affiliate acquire on its own the facilities to provide advanced services, presupposes a structurally separate affiliate subject to the

¹³ *Id.* ¶ 95 (emphasis added).

¹⁴ *Id.* ¶ 90 (citing the *Non-Accounting Safeguards Order* ¶ 312).

¹⁵ *Non-Accounting Safeguards Order* ¶ 309 (stating that “if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an ‘assign’ of the BOC”).

¹⁶ For the BOCs, neither may such authority be found in section 272, to the extent that the advanced services affiliate contemplated in this proceeding would not be subject to section 251(c). See *infra* note 19 and accompanying text.

¹⁷ See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, ¶ 61 (1996) (seeking comment on whether to modify or eliminate the separation requirements imposed on independent LECs as a condition for non-dominant treatment). See also, e.g., *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, ¶ 29 (rel. July 1, 1996) (finding that “Congress did not intend by implication to repeal [the Commission’s] authority to impose dominant or non-dominant regulatory treatment as [it] deem[s] necessary to protect the public interest consistent with [the Commission’s] statutory mandates”).

requirements of section 251(a) and (b), but free of the requirements of section 251(c).

The additional separation requirements proposed by the Commission should be only a precondition for the affiliate to receive non-dominant carrier treatment.

3. Separation Requirements for BOC Advanced Services Affiliate

Williams notes that the Separation requirements for non-ILEC status proposed by the Commission generally conform to the separation requirements contained in section 272.¹⁸ As noted above, Williams believes that the separation requirements proposed by the Commission should be a precondition for non-dominant status, not a precondition for non-ILEC status. Nevertheless, Williams believes that the similarity in these requirements will encourage the BOCs to use the advanced services affiliate route as a springboard into the interLATA market for information services. Therefore, Williams encourages the Commission to adopt in this proceeding the same separate affiliate requirements for non-dominant status that are contained in section 272 in order to relieve the BOCs from having to establish a duplicitous separate affiliate for the further provision of in-region interLATA advanced services.

Moreover, at least arguably, the structural separation requirements of section 272 do not apply to a BOC affiliate that is not "subject to the requirements of Section 251(c)."¹⁹ If a BOC establishes an advanced services affiliate that is not a "successor or assign" of the BOC, that affiliate would not be subject to the requirements of section 251(c), nor, it follows, to the requirements of section 272(b). Therefore, if the separate

¹⁸ 47 U.S.C. § 272(b)-(c).

¹⁹ *Id.* § 272(a)(1) (stating that "A [BOC] (including any affiliate) which . . . is subject to the requirements of Section 251(c)" must provide certain interLATA services pursuant to the structural separation requirements contained in section 272) (emphasis added). The

affiliate requirements that the Commission establishes in this proceeding, either as a precondition for non-dominant status or non-ILEC status, are less stringent than the separate affiliate requirements of section 272, arguably that BOC affiliate could, once it receives interLATA authorization under section 271,²⁰ provide advanced services (or any other service for which it uses facilities acquired independently from its BOC parent and which therefore is not subject to the requirements of section 251(c)²¹) on an interLATA basis without having to comply with the separate affiliate requirements of section 272. If this is the correct interpretation of section 272(a)(1), then it offers more compelling justification for the Commission to impose in this proceeding separation requirements for ILEC advanced services affiliates, either as a precondition to non-dominant status or as a precondition to non-ILEC status, that are at least as stringent as those in section 272.²²

B. Transfers from an ILEC to an Advanced Services Affiliate

negative implication is that a BOC affiliate that is not "subject to the requirements of section 251(c)" is not bound by the structural separation requirements in section 272.

²⁰ The Commission is mandated to not approve a section 271 application unless it finds, *inter alia*, that "the requested authorization will be carried out in accordance with the requirements of Section 272." *Id.* § 271(d)(3)(B). Congress arguably has given the BOCs two ways to carry out the requested interLATA authorization in accordance with the requirements of section 272: through an affiliate that is not subject to section 251(c), or through an affiliate that is subject to section 251(c). Under the former, section 272 imposes no further requirements; under the latter, section 272 imposes additional requirements.

²¹ "BOCs may conduct all, or some combination, of manufacturing activities, interLATA telecommunications services, and interLATA information services through a single separate affiliate." *Non-Accounting Safeguards Order* ¶ 61.

²² Whether this is the correct statutory interpretation may turn on whether, in section 272, the reference to a BOC affiliate is subsumed in the BOC definition so that in determining what entity is subject to section 251(c), only the BOC itself, not its affiliate, is relevant. This is supported by the wording of the Act: in section 271, Congress uses disjunctive language when referring to "a Bell operating company, *or any affiliate of that Bell operating company*," 47 U.S.C. § 271(b) (emphasis added), while in section 272, Congress uses inclusive language to refer to a "Bell operating company (*including any affiliate*)," *id.* § 272(a)(1) (emphasis added).

The Commission seeks comment on whether an affiliate should be deemed an assign of the ILEC if the affiliate acquires facilities on its own, and not by transfer from the ILEC.²³ By definition, to be an assignee of an ILEC, the ILEC must be the assignor. If the ILEC is not the assignor in a transfer of facilities to an advanced services affiliate, therefore, in the absence of a sham assignment, the advanced services affiliate cannot be deemed the “assign” of the ILEC with regard to those facilities.

IV. InterLATA Relief for BOC Advanced Services Affiliates

Under the 1996 Act, neither a BOC, “nor any affiliate” (including an advanced services affiliate) of a BOC, may provide in-region interLATA services²⁴ prior to Commission approval of an application therefor.²⁵ “Under section 271(d)(3), the Commission may grant a BOC authorization to originate in-region, interLATA services only if it finds that the BOC has implemented the competitive checklist set forth in section 271(c)(2)(B) and other statutory requirements.”²⁶

Section 271 applies the competitive checklist requirements to a BOC’s provision of “access and interconnection to its network facilities for the network facilities of one or

²³ *NPRM* ¶ 105.

²⁴ The term “interLATA service” means interLATA “telecommunications.” 47 U.S.C. § 153 (21). The Commission, however, considers interLATA information service and interLATA telecommunications service to both come within the definition of interLATA service for purposes of 47 U.S.C. § 271. In the *Non-Accounting Safeguards Order*, the Commission concluded that “the term ‘interLATA services’ encompasses both interLATA information services and interLATA telecommunications services.” *Non-Accounting Safeguards Order* ¶ 55. Therefore, “a BOC may not provide in-region interLATA information services until it obtains section 271 authorization.” *Id.* ¶ 57.

²⁵ 47 U.S.C. § 271(d)(3). In its Order, the Commission declined to hold that the forbearance authority granted in section 706 constitutes a grant of authority independent from the forbearance authority restriction in section 160(d), which forbids forbearance of section 271 before its requirements have been fully implemented. *NPRM* ¶ 69.

²⁶ *NPRM* ¶ 65.

more unaffiliated competing providers of *telephone exchange service*.”²⁷ The Act defines

“telephone exchange service” as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) *comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service*.²⁸

As the Commission points out in its Order, the emphasized language in this definition encompasses packet-switched data services.²⁹

A. Section 271 Applications for InterLATA Information Services

The provision of advanced services enables end users to utilize the same facilities to access both the conventional switched-access telecommunications network and packet-switched data networks such as the internet.³⁰ Thus, for example, through an xDSL-enabled transmission path, a BOC, or its advanced services affiliate, can offer both

²⁷ 47 U.S.C. § 271(c)(1)(A) (emphasis added). “Track B,” *id.* § 271(c)(1)(B), is available only when no such potentially competing provider has made a “qualifying” request for such access and interconnection. *In the Matter of Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, ¶ 60 (FCC 97-418) (rel. Dec. 24, 1997).

²⁸ 47 U.S.C. § 153(47) (emphasis added).

²⁹ “Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service.” *NPRM* ¶ 41.

³⁰ *See, e.g., id.* ¶ 30:

In circumstances in which the xDSL-equipped line carries separate POTS (‘plain old telephone service’) and data channels, the carrier must separate those two streams when they reach the telephone company’s central office. This is done in a device known as a digital subscriber line access multiplexer, or DSLAM. The DSLAM and central office xDSL modem send the customer’s POTS traffic to the public, circuit-switched telephone network. The DSLAM sends the customer’s data traffic (combined with that of other xDSL users) to a packet-switched data network.

interLATA telecommunications services and interLATA information services.³¹ Section 271, however, prohibits BOCs, or their affiliates, from providing either service across LATA boundaries without Commission authorization.

In authorizing such service offerings under section 271, the Commission should “treat the two services separately.”³² The Commission may bifurcate its review of a BOC’s 271 application by assessing the Act’s competitive checklist compliance against the BOC’s provisioning of access and interconnection to its advanced services facilities independently from the BOC’s provisioning of access and interconnection to its POTS facilities. If the BOC satisfies the checklist requirements for its advanced services, it may pursue interLATA authorization to provide in-region information services regardless of whether the BOC satisfies those requirements for its POTS. Alternatively, the Commission may accept, for review in the same manner, a BOC’s 271 application seeking only authority to provide in-region interLATA information services separate from an application seeking authority to provide in-region interLATA telecommunications services.

³¹ The POTS traffic represents “pure transmission capability” and should thus be regulated as a telecommunications service. *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, ¶¶ 38-42 (FCC 98-8) (Rel. Jan. 30, 1998). The data traffic, on the other hand, constitutes a “mixed or hybrid” service, inseparably combining transmission service with information service. *Federal-State Joint Bd. on Universal Service*, Report to Congress, CC Docket No. 96-45, ¶¶ 56-60 (rel. Apr. 10, 1998) (referring to the information services as “an inseparable part” of the transmission component, and stating that such “hybrid services” are information services, not telecommunications services). *See also Non-Accounting Safeguards Order* ¶ 122 (“Whenever interLATA transmission is a component of an information service, that service is an interLATA information service, unless the end-user obtains the interLATA transmission service separately”). While such interLATA information service will ride atop an interLATA transmission component, that does not change it from an information service to a telecommunications service.

There is nothing in the 1996 Act that precludes applying for or granting 271 approval for in-region interLATA information services, separate from in-region interLATA telecommunications services. Such bifurcation reasonably balances the market opening objectives of section 271 and the Act's goal for the timely deployment of advanced telecommunications capability under section 706. Moreover, as a matter of public policy,³³ giving the BOC's increased flexibility to establish an advanced services affiliate through which it can provide in-region interLATA information services will encourage such "affiliates to provide innovative new services,"³⁴ through the deployment of advanced services facilities, which, in turn, will spur non-affiliated advanced services entities to speed up their own deployment schedules.

B. Section 271 Standard for Approval of InterLATA Information Services

A BOC seeking authority to provide in-region interLATA information services through an advanced services affiliate should be deemed to meet the competitive checklist requirements of section 271 if the BOC is providing access and interconnection to its xDSL, or other advanced services, facilities, to "one or more unaffiliated competing providers of [advanced services],"³⁵ in conformance with the checklist requirements.³⁶ In

³² NPRM ¶ 36.

³³ See *Non-Accounting Safeguards Order* ¶ 315 ("The goal of the 1996 Act is to encourage competition and innovation in the telecommunications market").

³⁴ *Id.*

³⁵ 47 U.S.C. § 271(c)(1)(A).

³⁶ Only those checklist items that pertain to information service and that have been requested by competitors would be relevant. See, e.g., *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, ¶ 115 (FCC 97-298, rel. Aug. 19, 1997) ("Congress did not intend to require a petitioning BOC to be actually furnishing each checklist item"). So long as the BOC makes the checklist item available as both a "legal and practical matter," checklist compliance is satisfied. *Id.* ¶ 110.

applying the competitive checklist criteria, the Commission should consider them only in the context of the BOC's advanced services facilities, excluding the BOC's basic telecommunications facilities. Moreover, in light of the fact that "the market for information services is fully competitive, and the market for interLATA telecommunications services is substantially competitive,"³⁷ the Commission may want to consider establishing a rebuttable presumption that the BOC meets the checklist requirements of section 271 for access and interconnection to its advanced services facilities.³⁸

CONCLUSION

This proceeding may significantly impact the deployment of advanced services at the local level, and is of paramount importance in driving the availability of advanced telecommunications capability in the backbone networks. Under the current regulatory regime, the deployment of xDSL and other advanced services has been slow compared to the deployment of advanced telecommunications capabilities in the backbone networks. Williams believes that regulatory changes that encourage rather than discourage such deployment should be quickly implemented. Williams applauds the Commission for opening this docket to investigate what regulatory steps are necessary to encourage such timely deployment. Williams respectfully requests that the Commission consider its foregoing comments and adopt rules in this proceeding that address the issues raised in Williams' comments. In particular, Williams respectfully requests that the Commission permit ILECs to choose between offering advanced services on an integrated basis under

³⁷ *Non-Accounting Safeguards Order* ¶ 136.

the mandates of section 251(c), or through an advanced services affiliate free of section 251(c). Williams further asks the Commission to allow a BOC that establishes such an affiliate to seek and be granted authority under section 271 to provide interLATA information services exclusively through such an affiliate in accordance with the comments contained herein.

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³⁸ 47 U.S.C. § 271(d)(3)(B). Such an approach is not inconsistent with the Commission's standard for evaluating section 271 requirements that "the ultimate burden of proof with respect to factual issues remains at all times with the BOC." *Ameritech 271 Order* ¶ 43.